E & O Trading Sdn Bhd v Americk Singh Sidhu & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCVC)-2105–10 OF 2017 AND W-02(IM)(NCVC)-2100–10 OF 2017
IDRUS HARUN, SURAYA OTHMAN AND YEOH WEE SIAM JJCA
4 MAY 2018

Land Law — Sale of land — Agreement — Transfer of portion of land upon which annexe was erected — Allegations that annexe formed part of common property in condominium — Whether provided for in sale and purchase agreement entered into between vendor and purchaser that annexe part of common property — Whether transfer of annexe valid — Whether owners and residents of condominium have legal easement under sale and purchase agreement — National Land Code s 287

Two appeals arose from the High Court concerning the decision in allowing the respondents' application in encl 90 to re-amend their amended statement of claim. The first to fourth respondents in these appeals were owners of the units in Dua Residency Condominium ('the condominium') which were purchased from Edisi Utama in accordance with the condominium sale agreements entered into by both parties ('the sale agreements'). The fifth respondent was a body corporate established pursuant to s 39 of the Strata Titles Act 1985 which represented the interests of all the owners and residents in the condominium, including the first to fourth respondents. The appellants were in the business of premier luxury lifestyle property development. Both appellants were subsidiaries of E & O Bhd ('E & O'). Edisi Utama was the registered owner of a freehold land ('the land') and in 2004, Edisi Utama developed that portion of the land upon which Dua Residency was erected. On 17 November 2009, Edisi Utama transfered the portion of land upon which an annexe was erected to E & O Trading. In 2013, it came to the knowledge of the fifth respondent that there was a reduction in the provision of facilities and amenities available at the annexe as a result of termination by Edisi Utama of the tenancies of proprietors of outlets at the annexe. By April 2014, most of the tenants of the annexe had left. The respondents alleged that despite repeated requests by the fifth respondent to the appellants to solve the issue of the reduction of the provisions of amenities and facilities at the annexe and release of information on the status and future development of the annexe, the appellants failed to take any steps whatsoever to ensure that the advertised facilities and amenities were reinstated, in breach of its contractual obligations under the sale agreements. Thus, by the aforesaid conduct, the respondents plead, the appellants knowingly, intentionally and/or fraudulently caused a

breach of the aforesaid sale agreements. By reasons aforementioned, the respondents sought, in their amended statement of claim, inter alia, a declaration that: (a) the owners and residents of the condominium have under the sale agreements a legal easement pursuant to s 287 of the National Land Code ('the NLC'); (b) an injunction restraining E & O Trading from selling the annexe and/or replacing the annexe with a 41-storey block; and (c) a specific performance by the appellants of the sale agreements. The High Court allowed encl 90. Hence, the present appeals.

Held, allowing the appeals:

(1) The High Court judge erred in allowing encl 90. It was patently filed at the eleventh hour as a tactical manoeuvre in a deliberate attempt to delay proceedings and significantly alter the nature of the respondents' claim. When encl 90 was allowed by the High Court, the fifth respondent would become the custodian of the issue document of title of the land on which the annexe was erected and have all the powers conferred by the NLC on a proprietor in relation to its lands save the power to transfer charge or lien any portion of the common property. The amendments would have far-reaching implications on the appellants and change the scope and character of the action as the appellants had to prove at trial its indefeasible title to the annexe instead of showing that the residents of the condominium did not have the exclusive use in the nature of an easement of the annexe (see paras 18 & 31)

[Bahasa Malaysia summary

Dua rayuan timbul dari Mahkamah Tinggi terhadap keputusan membenarkan permohonan responden dalam lampiran 90 untuk meminda semula kenyataan tuntutan terpinda tersebut. Responden pertama dan keempat dalam rayuan ini adalah pemilik unit di Dua Residency Condominium ('kondominium') yang dibeli dari Edisi Utama di bawah perjanjian jualan kondominium yang dimasuki oleh kedua-dua pihak ('perjanjian penjualan'). Responden kelima adalah sebuah pertubuhan perbadanan yang ditubuhkan menurut s 39 Akta Hakmilik Strata 1985 yang mewakili kepentingan kesemua pemilik dan penduduk di kondominium, termasuk responden pertama hingga keempat. Perayu berada dalam perniagaan pembangunan bersama hartanah gaya mewah. Kedua-dua perayu adalah anak syarikat E & O Bhd ('E & O'). Edisi Utama adalah pemilik berdaftar tanah pegangan bebas ('tanah') dan pada tahun 2004, Edisi Utama membangunkan bahagian tanah di mana kondominium didirikan. Pada 17 November 2009, Edisi Utama memindah milik bahagian tanah di mana sebuah bangunan tambahan didirikan kepada E & O Trading. Pada tahun 2013, responden kelima mendapat tahu bahawa terdapat pengurangan penyediaan fasiliti dan kemudahan yang terdapat di kawasan tambahan akibat penamatan sewaan oleh Edisi Utama akan outlet di kawasan tambahan. Menjelang April 2014, sebahagian besar penyewa kawasan

A tambahan telah beredar. Responden-responden mendakwa bahawa walaupun permintaan berulang kali dibuat oleh responden kelima kepada perayu untuk menyelesaikan masalah pengurangan penyediaan fasiliti dan kemudahan di kawasan tambahan dan penyebaran maklumat mengenai status dan pembangunan masa hadapan kawasan tambahan, perayu gagal mengambil B apa-apa langkah untuk memastikan bahawa fasiliti dan kemudahan yang diiklankan itu telah dikembalikan, melanggar kewajipan kontraktualnya di bawah perjanjian jual beli. Oleh itu, berdasarkan tindakan yang dinyatakan, responden merayu, perayu dengan pengetahuan, dengan sengaja dan/atau secara penipuan menyebabkan pelanggaran perjanjian jualan tersebut. Atas C sebab-sebab yang dinyatakan di atas, responden memohon, dalam penyataan tuntutan mereka yang terpinda, antara lain, satu deklarasi bahawa: (a) pemilik dan penduduk kondominium, di bawah perjanjian jualan, mempunyai easemen perundangan bawah undang-undang s 287 Kanun Tanah Negara ('KTN'); (b) satu injunksi menghalang E & O Trading daripada menjual D dan/atau menggantikan kawasan tambahan tersebut dengan blok 41 tingkat; dan (c) pelaksanaan spesifik perjanjian jualan oleh perayu. Mahkamah Tinggi membenarkan lampiran 90. Oleh itu, rayuan ini.

E **Diputuskan**, membenarkan rayuan:

(1) Hakim Mahkamah Tinggi terkhilaf dalam membenarkan lampiran 90. Ia jelas difailkan lewat sebagai taktik untuk sengaja melengahkan proses dan secara signifikan mengubah sifat tuntutan responden. Apabila lampiran 90 dibenarkan oleh Mahkamah Tinggi, responden kelima akan F menjadi pemilik dokumen isu hak milik tanah di mana bangunan didirikan dan mempunyai semua kuasa yang diberikan oleh KTN kepada tuan punya berhubung dengan tanahnya kecuali kuasa untuk memindahkan pajakan atau lien mana-mana bahagian harta bersama. Pindaan tersebut mempunyai implikasi yang meluas kepada perayu dan G mengubah skop dan sifat tindakan itu kerana perayu perlu membuktikan semasa perbicaraan hak milik tak boleh sangkal terhadap bangunan tambahan dan bukan menunjukkan bahawa penduduk kondominium tidak mempunyai penggunaan eksklusif sifat easemen bangunan tambahan. (lihat perenggan 18 & 31).]

H **Notes**

For cases on agreement, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4946–4950.

I **Cases referred to**

Chew Chee Sun v Oriental Bank Bhd & Ors [1996] MLJU 322; [1997] 5 CLJ 101, HC (refd)

Hong Leong Finance Bhd v Low Thiam Hoe and another appeal [2016] 1 MLJ 301, FC (refd)

Kerajaan Negeri Selangor v Syarikat Bekalan Air Selangor Sdn Bhd; Kerajaan Malaysia (third party) [2012] 1 LNS 979, CA (folld)
Prestaharta Sdn Bhd v Ahmad Kamal bin Md Alif & Ors [2016] 4 MLJ 39, CA (refd)
The State Government of Sarawak & Ors v Teo Soo Chuan [2014] 4 MLJ 114,CA (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Legislation referred to

National Land Code ss 282, 283, 287
Strata Management Act 2013 ss 2, 4
Strata Titles Act 1985 ss 2, 4, 17B, 39

Appeal from: Civil Suit No 22NCVC-439–08 of 2015 (High Court, Kuala Lumpur)

David Mathews (Tina Ann Francis and C Kuhan Pillai with him) (Mathews Hun Lachimanan) for the appellant.
Tommy Thomas (Ganesan Nethi with him) (Tommy Thomas) for the respondent.

Idrus Harun JCA:

[1] These two appeals were heard together as they arose from a High Court's decision on 27 September 2017 in allowing the respondents' application in encl 90 to re-amend the amended statement of claim dated 1 September 2016 in Kuala Lumpur High Court Civil Suit No 22NCVC-439– 08 of 2018. The appellants ('Edisi Utama and E & O Trading'), qua the second and third defendants in the court below, filed two separate appeals against the said High Court's decision. For reasons which we shall state in our judgment, the appeals were allowed. Where appropriate, we shall refer to both appellants respectively as Edisi Utama and E & O Trading. Before proceeding further, it is necessary to draw attention to one aspect of the appeal proceedings before this court. These appeals were heard on 22 November 2017 upon the filing of a certificate of urgency by the appellants on 15 November 2017, barely two months after the High Court's decision which, as aforestated, was delivered on 27 September 2017. We proceeded to hear these appeals without grounds of judgments as these were interlocutory appeals based on affidavit evidence.

[2] To appreciate the contentions that had been raised before this court, it would be desirable to examine in summary the material facts. The first to fourth respondents in these appeals, who are the plaintiffs in the court below, are owners of the units in Dua Residency Condominium ('Dua Residency') which were purchased from Edisi Utama in accordance with the Dua Residency Sale Agreements entered into by both parties ('the sale agreements').

A The fifth respondent is a body corporate established pursuant to s 39 of the Strata Titles Act 1985 (Act 318) which represents the interests of all the owners and residents in Dua Residency including the first to fourth respondents. The appellants are in the business of premier luxury lifestyle property development. Both appellants are subsidiaries of E & O Bhd ('E & O'). Through its B subsidiaries, E & O promotes, develops and builds premier luxury properties locally and internationally.

[3] Edisi Utama was the registered owner of all that freehold land situated at C Geran 58582 for Lot 341 Kuala Lumpur, measuring in total approximately 207,507 sqft ('the land'). In 2004, Edisi Utama developed that portion of the land measuring approximately 177,938 sqft upon which Dua Residency was erected. In 2003, Edisi Utama constructed a three-storey retail and restaurant complex called the annexe adjacent to Dua Residency on the remaining D portion of the land measuring approximately 29,569 sqft. According to the respondents, by the pre-sale brochure used by Edisi Utama in advertising and promoting the sale of Dua Residency Units, Edisi Utama had held out that the annexe would thereafter serve to complement the future residential facilities of Dua Residency that would be made available for use by the residents.

E

[4] On 17 November 2009, Edisi Utama effected the transfer of the portion of the land upon which the annexe was erected to E & O Trading. In 2013, it came to the knowledge of the fifth respondent that there was a reduction in the provision of facilities and amenities available at the annexe as a result of F termination by Edisi Utama of the tenancies of proprietors of outlets at the annexe. By April 2014, most of the tenants of the annexe had left. The respondents allege that despite repeated requests by the fifth respondent to the appellants to solve the issue of the reduction of the provisions of amenities and facilities at the annexe and release of information on the status and future G development of the annexe, the appellants failed to take any steps whatsoever to ensure that the advertised facilities and amenities were reinstated, in breach of its contractual obligations under the sale agreements. Thus, by the aforesaid conduct, the respondents plead, the appellants knowingly, intentionally and/or fraudulently caused a breach of the aforesaid sale agreements.

H

[5] By reasons aforementioned, the respondents seek, in their amended statement of claim, inter alia, a declaration that the owners and residents of Dua Residency have under the sale agreements a legal easement pursuant to s 287 of the National Land Code (Act No 56 of 1965), an injunction I restraining E & O Trading from selling the annexe and/or replacing the annexe with a 41-storey block and a specific performance by the appellants of the sale agreements.

[6] The position adopted by the appellants as clearly described in their

pleadings is that at no point in time did it ever represent or warrant to the purchasers of units in Dua Residency that they would have an easement over the annexe. Indeed, the appellants make reference to the deeds of mutual covenants entered into between the appellants and the first to fourth respondents which make it clear that the respondents do not have rights over the annexe in the form of an easement.

[7] It ought to be mentioned that the action herein was commenced by the respondents on 11 August 2015 initially against E & O as the first defendant and Edisi Utama as the second defendant. The dispute in the action centres on the depletion of facilities and amenities at the annexe, the property belonging to E & O Trading. At that juncture, without naming E & O Trading as a defendant, albeit it was within the knowledge of the respondents that E & O Trading was the owner of the annexe, the respondents sought, inter alia, reliefs that the residents of Dua Residency had an easement over the provision of facilities and amenities at the annexe. On 28 September 2015, E & O filed an application to strike out the respondent's writ of summons and the statement of claim. However, on 27 January 2016, the High Court dismissed the said application on 27 January 2016. E & O filed an appeal against the decision of the High Court. On 27 July 2016 this court allowed the E & O's appeal and struck out the respondents' writ of summons and the statement of claim.

[8] When E & O was struck out as a party, the trial of the action was scheduled for hearing on 1 September 2016, 2 September 2016 and 5 September 2016. On 9 August 2016 however, the respondents filed an application to add E & O Trading as a defendant to the action and amend the writ and statement of claim dated 11 August 2015 relying on the fact that E & O Trading was the registered proprietor of the annexe ('the joinder and first amendment application'). On 1 September 2016, E & O Trading was added as a defendant and the High Court granted leave to the respondents to amend the writ and statement of claim. The trial was rescheduled to 16–18 January 2017, which was taken off eventually.

[9] Edisi Utama on the other hand, filed an application to strike out the respondent's claim on the basis that the fifth respondent did not have locus to commence the action as the annexe did not form common property (Edisi Utama's striking out application). The Edisi Utama's striking out application was not allowed in the High Court and the Court of Appeal upheld the decision on 10 January 2017. It is interesting to note that the respondents at this point maintained their claim for an easement over provision of facilities and amenities at the annexe and succeeded in persuading the High Court that the action, as it was, disclosed sufficient triable issues to warrant a trial. Pleadings were closed in due course and common bundle of documents, statements of agreed as well as disagreed facts were all filed on or about

February 2017. The parties were scheduled for trial on 25–28 April 2017.

[10] In the meantime however, on 17 March 2017 barely a month before trial, the respondents brought this application in encl 90 seeking to amend their amended statement of claim which application was allowed by the High Court on 27 September 2017. The two appeals before this court, as earlier stated, are filed by Edisi Utama and E & O Trading against the said High Court's decision in allowing the application in encl 90. The trial on 25 April 2017 however, did not proceed pending settlement and new trial dates were fixed on 20–22 November 2017.

[11] By the application in question, the respondents now seek in para 33(i) of the proposed re-amended statement of claim a declaration that the annexe forms part of the common property of Dua Residency within the meaning of the Strata Titles Act 1985 (Act 318) and the Strata Management Act 2013 (Act 757). Upon a scrutiny of the proposed amendments, we could discern a marked change in the respondents' case in that the original claim for an easement over provision of facilities and amenities has consequently been relegated to a prayer in the alternative in para 33(ii) thereof. In para 8 of the proposed re-amended statement of claim, the respondents have also added an assertion that the annexe forms part of the common property of the land. Thus, it is abundantly clear that, as opposed to their claim for easement over the annexe, the primary relief now sought by the respondents is a declaration that the annexe forms part of the common property of Dua Residency.

[12] The law as explained by the Federal Court in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 gives a discretion to a judge to allow leave to amend pleadings. But such discretion must of course be exercised judicially to this end, and the trite general principle is that the court will allow such amendments as will cause no injustice to the other parties. We now quote from the judgement of the Federal Court the following excerpt which appears at p 214:

> Three basic questions should be considered to determine whether injustice would or would not result (1) whether the application is bona fide; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

[13] Having briefly rendered the law upon the subject of amendment of pleadings, we shall proceed to consider the rival arguments of counsel for the respective parties. Taking the first argument, the issue here is whether the amendment, if allowed, would in effect and substance turn the suit from one character into a suit of another character. Learned counsel for the respondents in his oral submission submitted that the respondents' claim was originally

premised on easement and now they are seeking a declaration to the effect as we have indicated earlier that is that the annexe formed part of the common property. Further in their submission, it was contended that all that the respondents were asking was to run an alternative argument during the trial. The amendments are purely matters of law which do not change the character of the claim within the meaning of amendment jurisprudence.

[14] But may it be remembered that from the start of the action in 2015 until March 2017, the respondents sought various declarations that there was an easement over provision of facilities and amenities at the annexe. By doing so it would be legitimate for this court to say that the respondents have recognised and affirmed the ownership of the annexe by E & O Trading subject to the easement. In fact, the joinder and first amendment application by the respondents to join E & O Trading as a party, was made on that very same ground. They had also resisted the Edisi Utama's striking out application on this very same pleaded basis. It is thus without question that by doing so, the respondents have recognised and affirmed the ownership of the annexe by E & O Trading in the High Court, subject to the easement. What has emerged from the scrutiny of the appellant's defence is that the appellants too have adopted their position in their pleadings that the respondents are seeking an easement, and never on the basis that the annexe belongs to the respondents as common property. Trial preparation has also proceeded on this ground with bundles of documents and witness statements filed on this basis.

[15] Now, the statutory interpretation of the word 'easement' in s 282 of the National Land Code (Act No 56 of 1965) and the rights capable of being granted as an easement under s 283 of the same Code may be simply explained as the right of one landowner to make use of another nearby piece of land for the benefit of his own land and all legal titles to that other land remain with the land owner who grants the right. The relevant provisions of ss 282 and 283 of the National Land Code (Act No 56 of 1965) are expressed in the following terms:

> 282 Meaning of 'easement'
>
> (1) In this Act 'easement' means any right granted by one proprietor to another, in his capacity as such and for the beneficial enjoyment of his land, in accordance with the following provisions of this Chapter.
>
> ...
>
> 283 Rights able to be granted as easements
>
> (1)The rights capable of being granted as easements are, subject to subsection (2) —
>
> (a) any right to do something in, over or upon the servient land; and
>
> (b) any right that something should not be so done.

(2) The said rights do not include —

(a) any right to take anything from the servient land; or

(b) any right to the exclusive possession of any part thereof:

Provided that nothing in paragraph (b) shall prevent the existence as an easement of any right involving the placing and maintaining in or upon the servient land of any installations or other works.

[16] A consideration of the definition of an easement as was discussed by this court in the case of *The State Government of Sarawak & Ors v Teo Soo Chuan* [2014] 4 MLJ 114 confirms the above interpretation and is consonant with the provisions quoted above. This court in that case, said:

> We find no difficulty with the meaning of 'easement' in the *Concise Oxford Dictionary* as '(Law) *right of way or similar right over another ground*'. Nor do we have any difficulty with the definition of easement in *West's Encyclopaedia of American Law* (2nd Ed) that: *A right of use over property of another*. Traditionally the permitted kinds of uses were limited, the most important being 'rights of way' and rights concerning flowing waters. The easement was normally for the benefit of adjoining lands, no matter who the owner was (an easement appurtenant) rather than for the benefit of a specific individual (easement in gross). (Emphasis added.)

[17] What has clearly emerged from the proposed amendments is that the respondents are now making a new claim that the annexe is the common property of Dua Residency, which by virtue of s 17B of the Strata Titles Act 1985 (Act 318), ownership of common property vests with the management corporation of Dua Residency namely the fifth respondent. It would be useful to reproduce the relevant part of s 17B of the Strata Titles Act 1985:

17B Ownership of common property and custody of issue document of title

(1) The management corporation shall become the proprietor of the common property and the custodian of the issue document of title of the lot.

(2) Subject to subsection (3), the management corporation shall, in relation to the common property, have the powers conferred by the National Land Code on a proprietor in relation to its land.

(3) The management corporation —

(a) shall exercise all the powers referred to in subsection (2) only on the authority of a unanimous resolution (except where it is specifically provided otherwise in this Act); and

(b) shall not have the power to transfer, charge or lien any portion of the common property which forms part of the building or of the land

on which the building stands.

(4) Where an instrument is executed by the management corporation in the exercise of its powers under subsection (2), the instrument shall be accompanied by a document under the seal of the management corporation stating that —

(a) the resolution directing the transaction to which the instrument relates was passed; and

(b) the transaction conforms to the terms of the resolution.

(5) The instrument executed under subsection (4) shall, in favour of the Registrar or a party to the transaction other than the management corporation, be conclusive evidence of the facts certified.

[18] It is also apposite to be reminded of what this will entail when the application is allowed by the High Court, that is that, the fifth respondent, by virtue of s 17B of the Strata Titles Act 1985 (Act 318), shall also become the custodian of the issue document of title of the land on which the annexe is erected and have all the powers conferred by the National Land Code (Act No 56 of 1965) on a proprietor in relation to its land save the power to transfer, charge or lien any portion of the common property. The amendments thus without question will have far-reaching implications on the appellants and change the scope and character of the action as the appellants now have to prove at trial its indefeasible title to the annexe instead of showing that the residents of Dua Residency do not have exclusive use in the nature of an easement of the annexe. In the event, we cannot accede to the argument urged on behalf of the respondents that the amendments are purely matters of law which do not change the character of the action.

[19] We refer to the Court of Appeal's decision in *Kerajaan Negeri Selangor v Syarikat Bekalan Air Selangor Sdn Bhd; Kerajaan Malaysia (third party)* [2012] 1 LNS 979 where this court reversed the High Court's decision in allowing an amendment application on the basis that the amendment widened the claim. Ramly Ali JCA (as His Lordship then was) in delivering the judgment of the court said:

> [10] ... The amendment would change the character and scope of the first respondent's claim. *In the proposed amendment the first respondent is seeking for declaration that the agreed tariff was RM1.89/m3. This ran counter to the position taken that it was entitled under cl 11.3(4) of the concession agreement for the sum originally claimed by reason of the application of the prescribed formula*. Without an agreed tariff, the compensation could not be said to be due. The agreed tariff (as the name suggests) must be determined by agreement of the parties to the concession

agreement, and to ask for a declaration of the court to that effect (without an agreement of the parties) is actually changing the scope and character of the claim in the statement of claim.

[11] ...

[12] ...

[13] The proposed amendment was only to para 29 of the statement of claim, ie, the paragraph setting out the prayers in the statement of claim. *No amendment was sought to the main body of the pleading. The appellant is clearly prejudiced. The appellant is now compelled to meet a case radically different from the one it was first called upon to meet*. As such the pleaded case of the first respondent went in one direction (based on the specific provision of cl 11.3) whereas the prayers invited the court for a determination of facts in a different direction. This will pose difficulties in the preparation for trial by the appellant — particularly in preparing for its defence if the amendment is allowed by the court. *This is a case where the respondent has been granted leave to pursue remedies which stand on a very different footing. The claim was originally one confined to a narrow premise; its scope has now been extensively widened by the amendment. The nature of the proposed amendments and the impact it has on the issues at trial cannot be ignored.* (Emphasis added.)

[20] Applying the above decision to the facts of the present case, it could reasonably be said that had the learned judge appreciated the expansion of the respondents' claim from an easement to ownership which is clearly a complete departure from the main relief earlier sought, His Lordship would have appreciated the issues that arose from the expansion and the prejudice that would be caused to the appellants.

[21] We now turn to the second ground taken in this appeal. Learned counsel for the appellants submitted that the proposed amendments which seek to plead that the Annex is common property is unsustainable in law and in fact. The reasoning of learned counsel for the appellants, as we understand it, is that under s 2 of the Strata Titles Act 1985 (Act 318) and s 4 of the Strata Management Act 2013 (Act 757), a lot becomes common property when the lot is within the development area, it does not form part of any parcel within the development area and it is capable of being used and enjoyed by occupiers of two or more parcels. However, learned counsel submitted, the development area of dua residency in the sale agreements and deeds of mutual covenants that were entered into between the unit owners of Dua Residency and Edisi Utama clearly showed that the annexe did not form part of the development area. We now quote from ss 4 and 2 of the Strata Titles Act 1985 (Act 318) and the Strata Management Act 2013 (Act 757) respectively the definitions of common property:

(a) s 4 of the Strata Titles Act 1985:

'common property' means *so much of the lot as is not comprised in any parcel*

(including any accessory parcel), or any provisional block as shown in a certified strata plan;

(b) s 2 of the Strata Management Act 2013:

'common property' —

(c) in relation to a building or land intended for subdivision into parcels, means so much of the development area —

(i) as is not comprised in any parcel or proposed parcel; and

(ii) used or capable of being used or enjoyed by occupiers of two or more parcels or proposed parcels; or

(d) in relation to a subdivided building or land, means *so much of the lot* —

(i) *as is not comprised in any parcel*, including any accessory parcel, or any provisional block as shown in a certified strata plan; and

(ii) *used or capable of being used or enjoyed by occupiers of two or more parcels*; (Emphasis added.)

[22] Based on the above definitions, clearly the law, we apprehend, is that common property refers to the lot which is not comprised in any parcel. In relation to a subdivided building, parcel means one of the individual units comprised in a subdivided building. The affidavit of Kok Meng Chow affirmed on behalf of Edisi Utama on 5 April 2017, in paras 3.1 and 3.2, reveals that the property is not part of the common property of Dua Residency as such the annexe does not form part of the development area. The appellants additionally in paras 12 and 13 of their statement of defence have pleaded that paras 2 and 9 of the deeds of mutual covenants have excluded the annexe from the common property of Dua Residency. Learned counsel for the appellants submitted that pursuant to the preamble to the sale agreements, it is very clearly stated that Edisi Utama is the owner of the land measuring 174,700 sqft and is being developed as a housing project (the land). Under cl 2 (1)(e) of the deed of mutual covenants, the land is defined as '... excluding such parts thereof which are excluded or to be excluded pursuant to Clause 9 herein duly surrendered to the Appropriate Authority'.

[23] On the facts of the present case, we accept the appellants' submission that common property would therefore be only the area that falls within the development area of Dua Residency. We are mindful of the position adopted by the respondents that the amendments are purely matters of law. However, as the appellants have glaringly shown that the annexe is not part of the common property, the question of pleading the issue of law does not arise at all. The respondents are bound by the sale agreements and the deeds of mutual covenants. They cannot now seek to go beyond or resile from the terms and covenants which they have consented and agreed in the sale agreements and the

deed of mutual covenants (see *Prestaharta Sdn Bhd v Ahmad Kamal bin Md Alif & Ors* [2016] 4 MLJ 39).

[24] Since the annexe was never part of the development area of Dua Residency, the respondents, qua the purchasers, cannot seek to assert rights in the nature of common property. E & O Trading, as the current owner of the annexe, has been renting out the space in the annexe to various third parties and collecting rentals from them for several years now, with the knowledge of the respondents. If the annexe is indeed common property of Dua Residency, all rentals should have been paid to the fifth respondent. None of the respondents ever objected to this and they therefore ought not to be allowed to now assert that the annexe is common property. The respondents cannot approbate and reprobate its position. The proposed amendments are in our judgment eminently one that is unsustainable.

[25] The next point of importance in the appellants' contention worthy of our consideration is that there was an inordinate delay in filing the application in encl 90. It is to be remembered that when this suit was commenced in August 2015, the appellants had clearly taken the position that the annexe was not common property or formed part of Dua Residency that was acquired by the respondents as purchasers. This can manifestly be seen at paras 6(v), 7, 12 and 14 of the appellants' statement of defence. That it is so, is evident by the fact that paras 2 and 9 of the deed of mutual covenants expressly exclude the annexe from the common property of Dua Residency. The respondents had an opportunity to respond to the above by way of reply to the defence. However, the respondents did not avail themselves of that opportunity. The respondents had a further opportunity to include this issue when they amended their statement of claim for the first time on 1 September 2016 vide the joinder and first amendment application, again this was not done. There is no cogent and reasonable explanation put forth by the respondents to justify their delay in filing this application in encl 90. This case has been set down for case management on no less than six times between September 2016 to July 2017 and the respondents had ample time to file this application but only chose to do so less than one month before the full trial of this action. As such, the delay in filing this application amounts to an inordinate and excessive delay.

[26] The only justification tendered by the respondents to explain their delay is that the amendments in this application are necessitated by reason of the Edisi Utama's stand taken in the Court of Appeal when its appeal against the High Court's decision to dismiss the Edisi Utama's striking out application against the fifth respondent came up for hearing. The respondents' explanation is clearly misconceived and without basis. The appellants had in their statement of defence, filed as early as 11 September 2015 adopted the position that the fifth respondent had no locus standi to bring this action, on the basis

that the annexe was not common property. We would observe in this regard that no reply was filed by the respondents to clarify this issue. This was not a fresh argument raised for the first time before this court. The respondents have also not pleaded full particulars setting out their basis as to why the annexe is common property. Without such particulars, the court will be unable to ascertain if there is a real prospect of success in proving the same. It is thus reasonable to say that this application is simply a tactical manoeuvre by the respondents to circumvent the fatal flaw in their case, that is that, the fifth respondent has no locus standi to maintain these proceedings against the appellants.

[27] The respondents, having filed this application at an advanced stage of proceedings, have not shown more than some prospects or chances of success in the proposed amendments as required by the Federal Court in *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301. It ought to be emphasised that the respondents have a heavy onus placed on them to justify a new and significantly different case sought very late in the day. Zulkefli CJ (Malaya) (as he then was) delivering the judgment of the Federal Court in *Hong Leong Finance Bhd*, at p 311 said:

> [21] Based on the principles laid out the above case, we are of the view that there is therefore a heavy onus placed on the defendant in the present case to justify this application for amendment to the pleadings. The decision in *Worldwide Corporation*'s case has since been followed in a number of subsequent decisions in the United Kingdom with regard to late amendment applications and that the applicant must show the strength of the new case. In the case of *Savings and Investment Bank Ltd v Fincken* [2004] 1 All ER 1125, it was held that the court clearly expects the new case to have more than 'some prospect of success', particularly for late applications. The Court of Appeal held that:
>
> > Ms Gloster submits that it is enough that these amendments have some prospect of success. That may be a suitable test where an amendment comes at a reasonably early stage of proceedings. After all, if any pleading whether by amendment or not, cannot meet the test of some real prospect of success, it is in danger of being struck out. *In my judgment, however, the proper rule or guideline calls for a sliding scale: the later the amendment, the more it may require to commend it* ... (Emphasis added.)

[28] It would also be useful to be reminded of one of the guiding principles that can be gleaned from *Hong Leong Finance Sdn Bhd*, in which the Federal Court there authoritatively said that where an application to amend pleadings is made at a late stage, the court ought to consider the reason as to why the application is filed late and whether there has been a cogent and reasonable explanation. Obviously in these appeals, the respondents, as we have found earlier, fail to give a cogent reason for the inordinate delay. The learned judge, in our opinion, ought to have considered the delay of approximately two years

from the time the respondents received notice that the fifth respondent's locus was challenged and that the annexe was not a common property. Had the learned judge done so, His Lordship would have found that such delay in making this application was indeed excessive.

[29] We accept that a claim for an easement means that a party is claiming a right of use or right of access over property owned by another. It does not put forth a claim of ownership over the said property. The result as we have earlier held, is that the amendments proposed in the application completely transform the character of the suit and we make this finding as it is now obvious that the proposed amendments entail the respondents claiming ownership over the annexe, a position which is glaringly in direct contradiction with the respondents' earlier position. The original easement claim now manifests in the proposed amendments as an alternative claim. The proposed claim without any doubt, is for ownership of the annexe. The respondents did not proffer any explanation on this contradiction. When the bona fides of the application is being reasonably questioned by the appellants, it is incumbent upon the respondents to be truthful and candid in providing an explanation for the need to amend their pleadings (see *Chew Chee Sun v Oriental Bank Bhd & Ors* [1996] MLJU 322; [1997] 5 CLJ 101).

[30] Obviously, the respondents' proposed amendments are not bona fide, the proposed relief is not genuine and they resile from their earlier admission and position adopted in their pleadings. We would also say without any hesitation that the gravity so far as it concerns the respondents is stronger in making a claim that the annexe forms common property than an easement over the annexe. Such a declaration that will result in ownership, if genuine and bona fide, should have taken centre stage and would have been pleaded from the outset. However, instead of adopting that course of action, the respondents had veered off course towards pursuing the claim which was based merely on an easement. It is little wonder that the bona fides of these proposed amendments are being questioned by the appellants.

[31] For the reasons earlier given, it is clear that the learned judge erred in allowing the application in encl 90. It was patently filed at the eleventh hour as a tactical manoeuvre in a deliberate attempt to delay proceedings and alter significantly the nature of the respondents' claim. It is clearly an application filed without bona fides. The justification as explained by the respondents in supporting this application has convincingly been refuted by the appellants. The error by the learned judge ought to be rectified by this court. In the result, the application must be dismissed. The appeals are allowed and the decision of the learned judge is set aside. We make no order as to costs.

Appeals allowed.

Reported by Afiq Mohamad Noor